

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

75-7002

In The
United States Court of Appeals

For The Second Circuit

ULMONT O. CUMMING, JR.,

Plaintiff-Appellant.

B
P/s

- against -

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant-Appellee.

*On Appeal from the District Court of the United States for the
Southern District of New York*

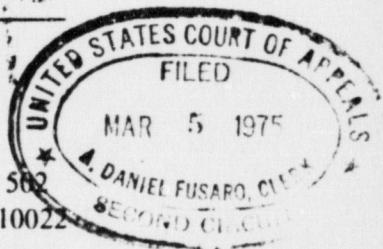
REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES DISTRICT COURT
SECOND CIRCUIT

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ULMONT O. CUMMING, JR., :
Plaintiff-Appellant, :
--against-- :
SELMA ELLISON a/k/a SELMA HERSFELD, :
Defendant-Appellee. :
-----x

APPELLANT'S REPLY BRIEF

Statement

In our main brief on this appeal, we urged that the lower court erred in holding that the complaint failed to state a cause of action for the recovery of the subject apartment; that Cumming has a superior right to possession of the subject apartment and this action is an appropriate avenue with which to seek possession; that under New York law, Cumming is entitled to immediate possession of the subject apartment; and that Cumming is entitled to partial summary judgment on the limited issue of the superior right

to possession of the subject apartment because there were no genuine issues of fact to be tried which are relevant to this limited claim. We think these points were adequately demonstrated in our main brief, and will not burden the court with further discussion of them. We make only these brief responses to appellee's brief:

POINT I

THERE ARE NO QUESTIONS OF FACT TO BE TRIED WITH REGARD TO THE LIMITED ISSUE PRESENTED ON THIS APPEAL.

Contrary to the assertion of the appellee, the subject of retaliatory eviction has nothing to do with this appeal and has nothing to do with the motion for summary judgment which was presented to the Court below.

It should be noted that while technically irrelevant on this appeal, Cumming was evicted as a hold-over tenant and not as an undesirable tenant. The allegations of the petition in the Civil Court of the City of New York under which Cumming was eventually evicted are simply that Cumming's lease terminated and that he was holding over without the permission of the landlord. No allegation was contained in this petition to substantiate appellee's contention that Cumming was an undesirable tenant.

Assuming arguendo, that Cumming was an undesirable tenant, Ellison's proper remedy is set forth in the New York Statutes. First, she should have complied with the regulations issued pursuant to the Economic Stabilization Act of 1970 as amended, and offered Cumming a renewal lease. Then, and after fulfilling her obligations under the Act, Ellison would have been best advised to commence a special proceeding against Cumming in the Civil Court of the

City of New York to recover possession of the subject apartment from Cumming by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deems the tenant objectionable. (N.Y. R.P.A.P.L. Section 711[1]). However, the State Statute mandates that such proceedings shall not be maintainable unless the landlord shall, by competent evidence, establish to the satisfaction of the Court that the tenant is, in fact, objectionable.

It should be noted that the prior State proceeding was not brought upon the ground that the tenant was objectionable; it was brought upon the ground that the tenant's lease had expired and that the tenant was unlawfully holding over beyond the term thereof.

The prior decisions and opinions of Judge Tenney in the Court below, submitted to the Court as exhibits to our main brief upon this appeal, clearly show that upon the papers submitted to Judge Tenney in support of prior motions, there was no possible misunderstanding that Ellison did not recover possession from Cumming in the State Court upon the grounds that Cumming was objectionable; the fact that Ellison claims Cumming is objection-

able only originated in Court papers after the judgment upon which Cumming was evicted was reversed by the Appellate Term of the Supreme Court of the State of New York.

Previously, Cumming moved for summary judgment on the issue of liability for the tort of retaliatory eviction. The Court below found, and correctly so, that as to the limited issue of retaliatory eviction, there is a question of fact to be tried by a jury.

However, Cumming's motion for summary judgment in the Court below on the limited issue of his right to possession of the subject apartment, the denial of which motion is presented to this Court for review on this instant appeal, is predicated upon a statement of facts over which there is no dispute (Page 27 of the Appendix) which does not encompass retaliatory eviction.

Specifically, Cumming contends that by virtue of the fact that the landlord failed to renew his lease at a time when the landlord was mandated to do so, Cumming is entitled to possession of the subject apartment. Therefore, on the issue of possession, the motives of the landlord are not relevant -- just her acts -- which are not controverted by the appellee.

We will face Mrs. Ellison's motivation on the trial level on the subsequent trial of the action.

Apparently counsel for the appellee has misunderstood the Economic Stabilization Act because Section 210, Subdivision (a) which creates the instant cause of action does not require a retaliatory motive be present for Cumming to seek reclamation of his apartment.

However, that portion of the complaint which seeks damages for retaliatory eviction obviously requires a determination of whether or not retaliatory intent was present.

There would have been no need for Cumming to even allege retaliatory motive if his claim in the Court below was limited solely to a reclamation of his apartment.

CONCLUSION

It is obvious that counsel for the appellee mis-conceived the decision of the lower court. The decision of the lower court did not deny Cumming's motion for partial summary judgment because of a triable issue of fact. The decision of the lower court denied Cumming's motion for summary judgment because the lower court believed that Cumming did not seek the return of his apartment in his pleading.

It is obvious that the lower court erred in its thinking that Cumming did not seek the return of his apartment in his pleading because the pleading states the relief sought and the grounds upon which the relief is sought and the case law is rather consistent on the point that pleadings shall be interpreted liberally in favor of the pleader to the ends that substantial justice will prevail.

The decision below should be reversed, with a direction to the lower court to enter a judgment in favor of the appellant and against the appellee, reinstating the appellant to possession of his residence.

Respectfully submitted,

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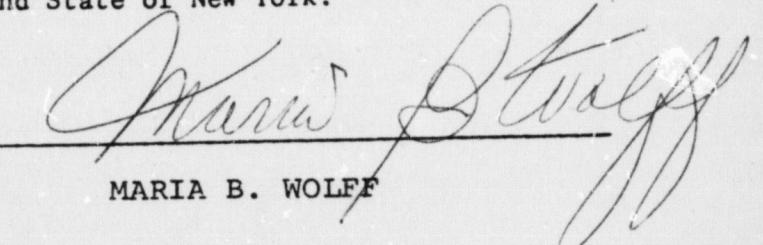
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COUNTY OF NEW YORK)

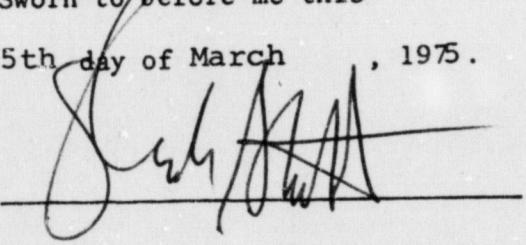
MARIA B. WOLFF, being duly sworn,
according to law, deposes and says:

1. Deponent is not a party to the within action or proceeding,
is over twenty-one (21) years of age, and resides in the City, County
and State of New York.

2. On March 5th, 1975, deponent served the within two copies
of Appellant's Reply Brief upon Messrs. Newman,
Aronson & Neumann, attorney(s) for Defendant-Appellee
in this action or proceeding at 350 Fifth
Avenue, New York, New York 10001, the address designated by
said attorney(s) for that purpose, by depositing a true copy of same
enclosed in a post-paid properly addressed wrapper in an official depos-
itory under the exclusive care and custody of the United States Postal
Service within the City, County, and State of New York.


MARIA B. WOLFF

Sworn to before me this
5th day of March, 1975.


HERMAN A. STOURH
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976